PUBLIC PROSECUTOR

v.

CHOO CHUAN WANG

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL TRIAL NO. 57-7-83]
28 OCTOBER 1987

CRIMINAL PROCEDURE: *Attempted robbery - Firearm discharged with intent to cause death - Knowledge that an accomplice was carrying a firearm at the time of commission - Cautioned statement - Admissible if made voluntarily.*

CONSTITUTIONAL LAW: *Right to a fair hearing - Whether it is permissible to imply the right in Article 5(1) of the Federal Constitution - Whether accused has established a breach of his right.*

EVIDENCE: Whether evidence of bad character admissible under s. 54 of the Evidence Act (Revised 1974).

The accused was charged in the High Court, Penang for an offence of attempted robbery in the event of which a firearm was discharged by one of his accomplice with intent to cause death to one Ng Yau Sam. The offence charged is provided under s. 3A of the Firearms (Increased Penalties) Act, 1971.

Counsel for the defence raised a preliminary objection that the prosecution's case was barred as the accused was denied of his constitutional right to a fair hearing implied under Article 5(1) of the Federal Constitution. He further contended that the accused has been prejudiced by the long delay and as there was a denial of his right, he was entitled to an order of unconditional release which would in effect be an order of acquittal.

The learned Judge agreed with the decisions of the Indian Supreme Court and held that Article 5(1) of the Federal Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time, by an impartial Court established by law.

In considering the interest of justice which consists of the accused's interest and the interest of the society at large, the fact that substantial delays in the disposal of criminal trials is inevitable as well as the fact that the accused had not made any allegation of specific prejudice, the learned Judge subsequently held that the preliminary objection be overruled and the trial to proceed.

On trial, the prosecution led evidence to show that the accused was not only an accomplice to the attempted robbery but had prior knowledge that one of his compatriots was carrying a firearm which would be used not merely to frighten and rob but to the extent of killing.

In making his defence by way of sworn evidence, the accused admitted that he was present at the material time and place but he claimed that he was merely accompanying one of the accomplice to look for the latter's enemy and had no intention of attempting a robbery. The accused further argued that he had no knowledge that one of the accomplice was carrying a firearm and that it was discharged at the material time and place.

The Counsel for the defence made an objection to the prosecutions question of whether the accused was a gangster.

The DPP further attempted to introduce the cautioned statement of the accused but was objected by the Counsel for the defence.

Held:

[1] The question of whether the accused was a gangster is disallowed on the basis that an affirmative answer would be evidence of bad character and such evidence would be inadmissible by virtue of s. 54 of the Evidence Act (Revised 1974). This is so as the defence has not adduced evidence of the good character of the accused nor had the defence impugned the character of any prosecution witness.

[2] On the admissibility of the cautioned statement of the accused, as a result of a "*Voir Dire*" or trial within a trial, the learned Judge was unsatisfied that the statement was made voluntarily. As such, it was inadmissible.

[3] On the question as to whether the accused could be reasonably presumed to have known that the man who discharged the firearm was carrying the same, the learned Judge gave consideration to a few things that is the medical evidence which showed beyond any doubt that a firearm, namely a handgun was fired in the deceased's direction; the testimony of prosecution's witness Siew Kim which showed that only one weapon that is the handgun was used in the robbery as well as the fact that it would not have been feasible for the accused and his accomplices to frighten and rob without the handgun. The learned Judge come to the conclusion accused and his compatriots had planned the robbery and as such, the man who discharged the handgun was carrying the same.

[4] The prosecution had established the 5 essential elements of the offence charged that is:

(a) that a scheduled offence (attempted robbery) was committed;

(b) that the accused was an accomplice in the said offence;

(c) that the accused was present at the scene of the attempted robbery;

(d) that a firearm was discharged within the meaning of s. 2 of the Firearms (Increased Penalties) Act, 1971; and

(e) that the accused may reasonably be presumed to have known that the person who discharged the firearm was carrying the same.

Thus, the onus is passed to the accused to prove, on the balance of probabilities that he had taken all reasonable steps to prevent the discharge of the firearm concerned. However, the accused's bare denial that he was a party to the robbery and his conduct at the scene of the crime could not possibly discharge the onus which lay upon him.

[Accused convicted and sentenced to death.]

Cases referred to:

Sita Ram v. State of U.P. [1987] 1 Indian Judicial Rep (All) 1.9 ***(cit)***
The State v. Maksudan Singh & Ors. [1986] AIR (Pat) 38 ***(cit)***
Madheshwardhari Singh and Anor. v. State of Bihar [1986] AIR (Pat) 324 ***(cit)***
Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna [1979] AIR SC 1360 ***(cit)***
Minister of Home Affairs v. Fisher [1980] AC 319 ***(foll)***
Bell v. DPP [1985] 3 All ER 73 ***(cit)***
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(cit)***
A. Ragunathan v. PP [1982] CLJ (Rep) 63 ***(cit)***
Chang Bock Eng v. PP [1979] 2 MLJ 149 ***(cit)***
Public Prosecutor v. Yuvaraj [1969] 2 MLJ 89 ***(cit)***

Legislation referred to:
Evidence Act, s. 54
Firearms (Increased Penalties) Act 1971, ss. 2, 3A
Federal Constitution, art. 5(1)

For the accused - Karpal Singh; M/s. Karpal Singh & Co.
For the public prosecutor - Bazain bin Idris

JUDGMENT

Edgar Joseph Jr J:

This accused was prosecuted before me upon the following amended charge:

> That you being an accomplice present at the scene, with one still at large and another who is believed to be dead now, did on 27 November, 1981 at about 9.40 p.m. at house No.1709, Kampong Tongkang, Permatang Tinggi in the District of Bukit Mertajam in the State of Penang, commit an attempted robbery, where a firearm was discharged by one of your accomplices with intent to cause death to one Ng Yau Sam and at the time of the commission of the offence you may reasonably be presumed to have known one of your accomplice was carrying a firearm, and that you have thereby committed an offence under s. 3A of the Firearms (Increased Penalties) Act 1971.

As soon as the accused claimed trial his Counsel, Mr. Karpal Singh, raised a preliminary objection the effect of which was that this prosecution was barred as the accused was denied his constitutional right to a speedy trial implied under Article 5(1) of the Constitution which reads:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

The chronology of events from the date of the arrest of the accused until the date of the commencement of the trial was as follows:

The accused was arrested on 15 July 1982 and first produced in the Magistrates' Court, Georgetown, when the charge was read over to him though no plea was recorded. On 5 May 1983 the case was transferred to the High Court upon the application of the Attorney General. In due course, the case was first set down for hearing from 24 February 1986 to 28 February 1986, but was adjourned by the Court of its own motion to make way for other judicial work. The case was then re-fixed for hearing from 16 February 1987 to 20 February 1987 but had to be postponed upon the request of Counsel for the defence because he was then engaged in other Courts and there being no objection by the prosecution. The case was then, once again, set down for hearing on 6 April 1987 to 10 April 1987 but the trial commenced on 7 April 1987 because the Court was engaged in another case on 6 April 1987.

Mr. Karpal Singh submitted that the main reason for the delay was because there were only two Judges in Penang and this has led to a backlog of cases. Be that as it may, the fact remained, so he said, that the accused had been prejudiced by the long delay and there being a denial of a constitutional right, the accused was entitled to an order of unconditional release which would in effect be an order of acquittal.

My attention was drawn to an array of cases including *Sita Ram v. State of U.P.* [1987] 1 Indian Judicial Reports (All) 1.9, *The State v. Maksudan Singh and Ors.* [1986] AIR (Pat) 38, *Madheshwardhari Singh and Anor. v. State of Bihar* [1986] AIR (Pat) 324 and *Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna* [1979] AIR (SC) 1360.

I do not propose to refer to specific passages in the judgments of the Court in each of the above cases for to do so might be tediously repetitive. It will be sufficient if I referred to certain passages in the judgment of one of them; my choice is *Madheshwardhari's* case (*ibid*). In that case, Sandhawalia CJ, speaking for the Supreme Court, enunciated the principles to be distilled from the earlier cases at p. 331 para. 16 as follows:

> (1) That, now by precedential mandate the basic human right to a speedy public trial in all criminal prosecutions has been expressly written as if with pen and ink in the constitutional right relating to life and liberty guaranteed under Article 21 of our Constitution. Further, that this right is identical in content with the express constitutional guarantee inserted by the Sixth Amendment in the American Constitution.
>
> (2) That the American precedents on the Sixth Amendment of that Constitution would be equally attracted and applicable as persuasive on this facet of Article 21 of our Constitution as well.
>
> (3) That once the constitutional guarantee on a speedy trial and the right to a fair, just and reasonable procedure under Article 21 has been violated, then the accused is entitled to an unconditional release and the charges levelled against him would fall to the ground.
>
> (4) That a callous and inordinate prolonged delay of ten years or more, which, in no way arises from the accused's default (or is otherwise not occasioned due to any extra-ordinary and exceptional reasons), in the context of reversal of a clean acquittal on a capital charge, would be *per se* prejudicial to the accused and would mainly violate the constitutional guarantee of a speedy trial under Article 21.

His Lordship did, however, add the following qualification:

> Indeed the significance of the fundamental right to speedy trial might well come more meaningfully to the fore in relatively minor cases. There can be no rationale or public interest in prolongation of investigation or the trial in the relatively insignificant crimes. In fact, the prolongation of such trials leads to greater hardship and the accused may sometimes be made to suffer more than what the law provides by way of a sentence in the shape of either light imprisonment or fines. This aspect has rightly been highlighted in the *Hussainara Khatoon's* cases ([1979] AIR SC 1360 and 1369). Instances are not lacking within our State where, for relatively minor offences, accused persons have been kept on the leash and directed to appear before the police or the Court for decades or more. Whilst in capital crimes there may be some justification, because of the heinousness of the offence to carry the trial to its logical conclusion, in minor offences injustice is more patent when harassment and hardship is inflicted for waiting for trial for periods longer than what the law envisages as the maximum punishment.

The first question for determination is whether in the absence of an express provision in our Constitution conferring upon an accused person charged with a criminal offence the right to a fair hearing within a reasonable time by an impartial Court established by law it is permissible to imply such a right in Article 5(1) of our Constitution.

The Courts in India in the cases cited above have construed Article 21 of the Constitution there as implying such a right. That article is generally *in pari materia* with the provisions of our Article 5(1) and reads as follows:

> 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

In the context of the problem posed here I do not consider that there is a material difference between the relevant article in the Indian Constitution and our Constitution because of the presence in the former of the word "procedure" as opposed to the word " law" in the latter. I say so because the point raised here touches the question of rights and that is not a procedural but a substantive matter.

Now, the correct approach to the interpretation of a Constitution was stated by the Privy Council in *Minister of Home affairs v. Fisher* [1980] AC 319 where Lord Wilberforce pointed out that provisions in a Bill of Rights "call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism; suitable to give to individuals the full measure of the fundamental rights and freedoms referred to' (at p. 25).

There are two approaches to the interpretation of a Constitution, according to his Lordship: it could be recognised as an Act of Parliament with room for interpreting it with less rigidity and greater generosity than other Acts, which would require the Court to accept any general presumption as a starting point but to recognise that it could more easily be displaced; or more radically, it could be treated "*sui generis*, calling for principles of interpretation of its own, suitable to its character... without necessary acceptance of all the presumptions that are relevant to legislation of private law" (at p. 26). The committee preferred the latter; Lord Wilberforce remarking:

> This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise... to individual rights capable of enforcement in a Court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure from the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences.

In the circumstances, applying a generous interpretation and avoiding the "austerity of tabulated legalism", I would respectfully agree with the decisions of the Indian Supreme Court and hold that Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia, CJ in *Madheshwardhari Singh v. The State (ibid)*, he would be entitled to an unconditional release and the charges levelled against him would fall to the ground

The second question for consideration was whether the accused in the present case had established a breach of his fundamental right aforesaid.

The general proposition that criminal work should be disposed of with the least possible delay in order to avoid hardship to the accused who may be in custody or who in any case has the right to have the criminal accusation against him determined as soon as possible, cannot be disputed. On the other hand, the interests of justice do not mean the interests of the accused only for we have to consider the interests of society at large in finding out wrongdoers and repressing crime and especially is this so in the case of a capital charge. The task of the Court must therefore be to balance these interests. In balancing these interests, the Courts must, in my view, take into account the practice and procedure of the Courts, the problems affecting the administration of justice in Malaysia, the length of the delay, the justification put forward by the prosecution, the responsibility of the accused for asserting his rights, the prejudice to the accused (if any) and, generally, the particular circumstances of the case concerned. (See the decision of the Privy Council in the Jamaican case of *Bell v. DPP* [1985] 3 AER 73.)

It was with the above considerations in mind that I considered the preliminary objection before me.

Now, Mr. Karpal Singh had himself conceded that the delay in this case was because there are only two High Court Judges in Penang. In other words, the delay in this case, in trying the accused, was because of over crowded judicial lists. So, the prosecution was not being blamed for the delay. It is in fact implicit in the objection taken by Counsel that substantial delays in the disposal of criminal trials in the High Court are common in Penang. Indeed, on checking the records of both the High Courts, Penang, I found as regards capital cases pending, delays of the order of four to six years were and are common. The number of capital cases pending trial, at the material time, in both these Courts was 66. I need hardly say that this number is being regularly added to. On average, each of the High Court Judges here would be able to dispose of one or, optimistically speaking, two cases per month, given the fact that they also have to cope with overcrowded civil lists. At this rate, it would be humanly impossible for the Judges to cope adequately with the mounting backlog of criminal trials with the result that substantial delays must be inevitable.

In the circumstances, had I upheld the objection of Counsel it would, in effect, mean a large number of accused persons charged with capital offences (mostly for drug trafficking) could never be put on trial and so would have to be set free. Surely, that cannot be in the public interest.

Moreover, it is most material to note that the accused in this case had not alleged any specific prejudice, such as witnesses who he had intended to call being untraceable or being incapable of giving evidence or the destruction or loss of other evidence or indeed any other prejudice, occasioned by reason of the delay. I might as well add that I did not overlook the fact that except for a short adjournment, the accused was in no way responsible for the delay in this case and that his solicitors had, in fact, on at least one occasion - on 7 September 1983 - written to the Senior Assistant Registrar of this Court asking that the case be tried "as soon as possible".

In the circumstances, I had no option but to overrule the preliminary objection and accordingly directed the trial to proceed.

I must now turn to consider the case on its merits.

According to the evidence led by the prosecution, on the night of 27 September 1981 at about 9, two brothers (both poultry farmers) were repairing a water tank in an open space 450 feet their dwelling house which was located in a lonely area in Kampong Tongkang, Permatang Tinggi, in the District of Bukit Mertajam (the house); the public road was about 1800 feet from it and the nearest house in relation to it was about 200 yards. One of the two - Ng Yeow Chong (PW5) - then aged 31 - thought that the float in the tank needed repairing so he told his younger brother, Ng Yau Sam, aged 29, to fetch a replacement from the back of their house. While his brother left on his bicycle to get the float, Yeow Chong walked to their 500 feet long chicken coup (which had an exit in the centre) to fetch some gum and tools to carry out the repairs to the tank. As he was about to bring down the basket containing the gum and tools, Yeow Chong saw two motor cycles approaching his house at high speed. Within 20 seconds after this he heard a gun shot. In all, he heard three gun shots but they were not fired in quick succession. On hearing this, he shouted "thieves! thieves! Catch the thieves!" He then got down the steps of the chicken coup and, as he did so, he saw two motor cycles leaving. He then ran along the 500 feet long chicken coup to get to his house and, as he did so, he heard the sound of crying. Upon entering the house his 31 year old sister Ng Siew Kim (PW4) told him that his brother had been shot and had been taken to a neighbour's house.

In order to know what had happened in the house at the material time, it is necessary to interrupt the sequence of events and to go back a little by referring to the testimony of Siew Kim who was then in the house watching the television with nine other members of the family only two of whom were adults, the rest being children.

While they were thus engaged watching the television, they were disturbed by the sound of two motor cycles which had pulled up right in front of the house, the entrance door being wide open. Three male Chinese were seen to alight from the motor cycles; one of them tied a handkerchief round his face up to his nose while standing with his back to the house then, he and one of the other two entered the house through the hall while the third man stood at the threshold with his hands behind his back. As one of the two walked into the house was entering or about to enter it he took out a small handgun from his waist after pushing aside his jacket.

Upon confronting the occupants of the hall, the masked man asked them to surrender their money and all their belongings while the gunman warned them to remain seated and to keep quiet. The latter then walked very fast towards the rear portion of the house. At this moment, the third man who, incidentally, wore no mask, rushed to the left side of the house while the masked man stood guard over the occupants in the hall. Two or three second later, Ng Siew Kim said that she heard the sound of three gun shots. The sequence of these gun shots was this: after the first shot there was a pause of one or two seconds, then came the second and third gun shots in quick succession. Soon after that, Siew Kim said that she heard someone - presumably the gunman, shout "Ah Bah". The masked man then ran out of the house through the main entrance but the gunman did not. But all three were seen to flee on their motor cycles. Siew Kim then went to the rear portion of the house where she saw her elder brother, Yau Sam, in a state of obvious distress for, although on his feet, he was bleeding from his belly and his back. He was promptly taken to a neighbour's house by his wife on a motor cycle.

Unfortunately, however, Yau Sam succumbed to his injuries the same night and the following day at about 9.30 a.m. a postmortem was conducted by Dr. Balbinder Singh, the medical officer attached to the Bukit Mertajam District Hospital.

Medical evidence from Dr. Balbinder Singh established that the victim had sustained seven external injuries in the thorax and death resulting therefrom was, in his opinion, caused by three gun shots. He identified the injuries by marks he made on the photos produced. When shown a dented bullet recovered by the police at the scene, being exhibit P4, he said that it could have caused any of the injuries mentioned. He added that the dent suggested that it had hit a hard object. He had also found an entry and an exit wound in the right upper thigh. One of the injuries - an entry wound between the 9th and 10th vertebrae - 3 cm. from the midline to the right and 1 cm. in diameter, showed signs of tatooing. The exit wound in relation to this wound was 3 cm. below the right nipple at the 7th intercostal space and 1 cm. in diameter.

I must now turn to consider the results of the police investigation into the case.

The police officer who carried out the initial investigation into the case was Insp. Radwan Yusoff (PW7). Having been informed of the shooting incident, at about 10.05 p.m. on the night in question, he proceeded to the Bukit Mertajam District Hospital arriving there some ten minutes later. There he identified the body of the deceased, Ng Yau Sam, and caused photographs (P 6A to D) to be taken by Police Constable Ahmad Suffian (PW2).

Later, the same night, at about 11.20, he proceeded to the house concerned, arriving there at about 11.50. There he drew a sketch plan and prepared a key (P 7 and P 7(K)). He explained that standing at the main entrance - PH in P7 - one could see the back of the house. But, if one stood at the right side of the main entrance, one could see the left window of the rear wall marked T (at the bottom) in P 7. If, on the other hand, one stood at the left side of the main entrance, then one could see part of the rear wall of the house and part of the window marked T (at the bottom).

He confirmed that he recovered two spent cartridges at the rear portion of the house and that KP 1 and KP 2 in P7 marked the points where they were recovered. He added that he had recovered the third spent cartridge outside the house at the point KP 3 in P7. He added that no blood stains appearing in photo P 6H were indicated in his sketch. He identified the spent cartridges being P 10A to C. On 28 November 1981 he handed over the exhibits he had recovered to ASP Lim Poh Bok (PW 10) who took over the investigations from him.

On 30 November 1981, acting on the instructions of Insp. Radwan, Detective Sgt. Manikam (PW 8) proceeded to the scene and upon arrival there, he recovered a .32 slug (P 11) about 10 feet from behind the back door of the house which he handed to Insp. Radwan five minutes later.

On 15 July 1982 at about 3 a.m., that is to say, nearly eight months after the incident - acting on information received - Insp. Ghani bin Sawi (PW 9), arrested the accused at his house at Sungei Rambai, Bukit Mertajam. On checking the person of the accused, he found on the right thigh of the accused a scar. He ended his examination in chief by saying that he had received information that one Chong Fook Choon who was involved in the robbery had died. This last piece of evidence was plainly hearsay and I disregarded it.

ASP Lim Poh Bok confirmed that he had on 28 November 1981 taken over investigations from Insp. Radwan. He added that the latter had handed over to him the spent cartridges P 10A to C. He had also recovered another slug from the laboratory assistant at the District Hospital Bukit Mertajam; this had been removed from the right thigh of the accused by Dr. Kumarappan on 19 August 1982. ASP Lim then packed and sealed the spent cartridges and the two slugs and delivered them to the Government Chemist who after examination returned them to him accompanied by his report thereon a copy whereof was duly served upon the accused and the original of which was produced and marked P 14.

ASP Lim then expressed the opinion that looking at the slugs and the cartridges concerned a .32 automatic pistol had been used. He went on to explain that when an automatic pistol has been fired the empty cartridge is automatically ejected from the right side of the pistol.

The prosecution also led evidence to show that Inspector Ahmad Saad (PW 6) acting on instructions from ASP Lim conducted two identification parades on 28 July 1982. At the first of these parades, ten persons stood in the line; all had their faces covered with handkerchiefs. The accused who was one of those in line was picked up by Siew Kim. At the second parade held on the same day, ten persons stood in the line. She again picked up the accused.

That, in sum, was the case for the prosecution.

Now, in the particular circumstances of this case, in calling upon the defence, I was satisfied in accordance with the principles enunciated in *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11, followed in *A. Ragunathan v. PP* [1982] CLJ (Rep) 63, that there was sufficient evidence which, if unrebutted, would have warranted the conviction of the accused in respect of the offence charged. The essential elements of the offence being:

(a) that a scheduled offence; in this case, attempted robbery was committed;

(b) that the accused was an accomplice in the said offence;

(c) that the accused was present at the scene of the attempted roberry;

(d) that a firearm was discharged within the meaning of s. 2 of the Act, by a person in the commission of the said offence; and

(e) that the accused may reasonably be presumed to have known that the person who "discharged" the firearm was carrying the same.

In consequence, the onus then passed to the accused "to prove" that he had taken all reasonable steps to prevent the discharge of such firearm.

Upon his defence being called, the accused elected to give sworn evidence. By way of introduction, the accused said that at the time of his arrest he was residing at 755, Sungei Rambai, Bukit Mertajam, and was a salesman by occupation. Casting his mind back, he recalled that two or three days before 27 November 1981, one Ah Siow had told him that he wanted to go to a dwelling house in Kampong Tg. Permatang Tinggi in Bukit Mertajam to look for his enemy. Under cross-examination, the accused amplified this part of his testimony somewhat by adding that Ah Siow had apparently met him by chance at a sea food restaurant in Kampong Bahru when he was invited to join Ah Siow to look for the latter's enemy. He had known Ah Siow for about three to four months before that and also knew that he was a gangster. He added that as he happened to be free then he accompanied Ah Siow on the night in question to the house concerned. When asked if he had not foreseen "an incident" since Ah Siow had said that he was looking for an enemy, he replied "Ah Siow did not tell me anything else. No, I did not foresee any incident happening".

He then proceeded to give an account of his movements on the night in question. He stated that he, Ah Siow and one Ah Hong had proceeded on two motor cycles - Ah Siow, who led the way, rode alone on one motor cycle and the accused following on another motor cycle with Ah Hong riding pillion. They both pulled up in front of the dwelling house concerned. Ah Siow then called Ah Hong to follow him into the dwelling house but told the accused to wait for him adding that he would return in a few minutes' time. The accused duly complied and waited in front of the house at a point, according to him, about 6 feet from the main entrance door which was open. He saw that both Ah Siow and Ah Hong walked very fast into the dwelling house through the front door. His Counsel then asked him: "Tell us what happened?" and he replied: "I heard a commotion. Then, Ah Siow ran out from the rear to the place where the motor cycle was parked. Ah Hong was still inside the house. Ah Siow asked Ah Hong to run away". All three then left the scene. This time the accused rode alone on his motor cycle while Ah Siow rode the other motor cycle with Ah Hong riding pillion.

Asked if he knew what the commotion in the house was about, he replied that it was some sort of fighting adding "I heard a sound like 'ping pong' coming from the rear portion of the dwelling house".

The accused then said that on the way back while riding his motor cycle as the wind blew he felt a pain on his right thigh adding that it was injured and bleeding.

He was then asked: "On that day were you at any time aware that your friends or any of them was armed with a firearm?", he replied "No, I was not aware".

He then said that he did not go home that night but instead went to the house of one Ah Teik. There he saw Ah Siow who, on seeing blood on the trousers of the accused, remarked that the latter had been shot. Ah Siow then applied some medicine on the wound. The accused also consumed some medicine, Coca Cola and rice wine, which Ah Siow gave him and went to sleep. But, before he did so, Ah Siow told him there was no need to go to the Government Hospital, so he did not. On waking up the next morning, he felt great pain in his right thigh and saw that it was bandaged in a singlet.

He recalled that he was arrested by the police in June or July 1982.

I propose now to touch upon the more important aspects of the cross-examination of the accused. Asked if he was not afraid to accompany Ah Siow who was going in search of enemy, he replied, "I was not afraid because I thought nothing would happen." He said he was not familiar with Kampong Tongkang. It did not occur to him as to what Ah Siow would do when he saw his enemy. He confirmed that while he was waiting outside the dwelling house, he had looked into it and saw that the occupants were watching T.V. in the hall; they were seated at the side. He said that it was not correct that when Ah Siow walked quickly to the rear of the dwelling house, he ran by the side of the dwelling house. He repeated that he did not see anyone with a gun that night and claimed that he did not hear any gun shot. He only heard "ping pong two or three times - like somebody banging the wall". He also heard voices as though somebody was quarrelling. He maintained that he did not go to the rear of the house when he heard the commotion. When it was put to him that his purpose in going to the dwelling house in Kampong Tongkang was to rob the occupants there, he said "I deny that. Ah Siow did not mention that to me". When it was put to him that if he was not involved in the robbery, he would have fled the moment he saw Ah Siow and Ah Hong enter the dwelling house, he replied "Ah Siow told me he was going in to look for someone and that he would return, so I waited". It was then put to him that he must have known that Ah Siow had a gun but he maintained "I deny that Ah Siow did not tell me he had a gun; neither did I see the gun". However, he admitted that he knew that Ah Siow was a gangster and that he had known him for three or four months. The learned Deputy then asked him if he was a gangster but, upon objection being taken by learned Counsel for the defence, I disallowed the question on the ground that the question, if answered in the affirmative, would be evidence of bad character and such evidence would be inadmissible as the defence had not adduced evidence of the good character of the accused nor had the defence impunged the character of any prosecution witness: see s. 54 of the Evidence Act (Revised 1974).

When it was suggested to the accused that he did not go to the hospital for treatment because he was afraid, he replied that he had intended to go to the Government Hospital that very night but Ah Siow had told him that his brother was a doctor in the General Hospital, Penang. He added that Ah Siow had also told him that his brother had operated on his wound. He denied that he did not see a doctor because he had participated in the shooting. But, he also said that he did not see a doctor because he was afraid, that if he did so, the police might have suspected him of being "involved in this incident". When it was put to him that if he was not involved in this incident he would not have been shot he replied: "I was at the scene and when I was shot I was not aware of it".

An attempt was then made by the learned Deputy to introduce the cautioned statement of the accused and, upon objection being taken by Mr. Karpal Singh for the defence, I directed a trial within a trial at the conclusion of which I ruled that it was not admissible as I was not satisfied that it was made voluntarily. The evidence disclosed that it was made after the

accused had been in custody for 15 days. There is authority for saying that prolonged custody immediately preceding the making of a confession is sufficient unless it is properly explained, to stamp the confession as involuntary. Each case must, of course, depend on its own facts.

I must now evaluate the evidence for the prosecution and the defence.

The case for the prosecution was that the accused was not only an accomplice to the attempted robbery but that he had prior knowledge that one of his compatriots was carrying a firearm, to wit, a handgun, which would be used, if necessary, not merely to frighten and to rob but to kill.

Clearly, the star witness for the prosecution was Siew Kim, the sister of the deceased. I was very much impressed both by her demeanour and content of her testimony. She was completely composed, gave her evidence in a straightforward manner and was in no way discredited in cross-examination. There was also nothing improbable in her evidence. Indeed, the only point on which her evidence was challenged by Mr. Karpal Singh was whether the accused went towards the rear of the house when the shooting began. She maintained that the accused had done so whilst the accused denied this. However, I saw no reason to disbelieve her. It was natural for the accused to deny this incident for, if true (and I found it was) it went to implicate him with the offence charged.

I would go further and say that I accepted the testimony of this witness as wholly reliable and credible. It will be noted that her powers of observation were well above the average, considering her station in life, for she had unhesitatingly identified the accused, a complete stranger, at two identification parades held some eight months after the incident by the police.

I have already recounted the testimony of this witness as regards the events in the house on the fateful night and it will suffice if I say that I accepted it as representing the truth for the reasons stated.

The accused maintained that he was merely invited by Ah Siow who he knew to be a gangster to join him to look for an enemy and, that as he happened to be free, he agreed to do so. He had no idea that a robbery had been planned. I am afraid I find this story not only strains credibility but is inherently so improbable that I have no hesitation whatsoever in dismissing it. If the story of the accused were true, then he had been invited by Ah Siow merely to witness a robbery; surely, this would be courting disaster for the accused would then be a potential witness for the prosecution in the event of an arrest. If, as the accused admitted, he had been invited, by a known gangster to join the latter to look up an enemy it must have been for a specific purpose. In other words the accused must have had a role to play. What was that role? The evidence of Siew Kim disclosed that the accused stood at the threshold during most of the 20 seconds when Ah Siow and Ah Hong were in the house except when at one stage he rushed to the side of the house. However, she confirmed that the accused never entered the house. But she also testified, and this two robbers made their entry into the house, one of them tied a handkerchief while standing in front of the house with his back to it.

The accused must have had excellent view of this event for it happened right in front of him. He must also have seen one of his compatriots confront the occupants in the hall. Yet he stood still and made no attempt whatsoever to intervene or, at least, depart from the scene on the motor cycle which was his personal property. Instead, he faithfully complied with the request of Ah Siow to wait for him until he returned. Then again, upon his own evidence, the accused admits that all three started out and left the scene together on two

motor cycles. What was the necessity for two motor cycles? If, as the accused said, he was merely asked to accompany the duo to look for an enemy there was no necessity to invite the accused to join them for they had their own transport. In my judgment, the inference is irresistible that the accused was a party to the intended robbery and his role was, at the very least, to act as a look out.

Clearly, therefore, the accused was an accomplice to the attempted robbery and was present at the scene at the time of its commission when a firearm was discharged within the meaning of s. 2 of the Act by one of his compatriots. The real point in the case was whether, upon the evidence as a whole, the accused may reasonably be presumed to have known, at the material time that the person who discharged the firearm was carrying the same.

It will be recalled that the testimony of Siew Kim was that the masked man took out a small gun from his waist after pushing aside his jacket and that he did so either as he was about to enter or as he was entering the house through the main entrance. Both he and the masked man then confronted the occupants in the hall; the former ordered them to remain seated and to keep quiet while the latter commanded them to surrender their money and all their belongings. The man with the gun then walked very fast towards the rear portion of the house. It was at this stage that the accused rushed to the side of the house while the masked man stood guarding the occupants in the hall. It was two or three seconds after the man with the gun walking to the rear of the house that Siew Kim heard three gun shots. They were not all fired in quick succession; for, after the first shot was fired, there was a pause of one or two seconds, then followed the second and third shots in quick succession. She then heard someone shout "Ah Bah". The masked man then ran out of the house through the main entrance but not the man with the gun who used another exit. In any event, all three fled on the motor cycles.

The crucial point in the whole case, as I have said, was whether the accused could be reasonably presumed to have known that the man who discharged the firearm was carrying the same. It is not necessary for the prosecution to prove that the accused knew, at the time he joined his compatriots, that one of them would be armed during the intended robbery: see *Chang Bock Eng v. PP* [1979] 2 MLJ 149.

The evidence led by the prosecution showed clearly that this was a deliberately planned robbery of occupants in a dwelling house by three persons, one of whom was the accused, in the course of which a firearm, namely a handgun, was used within the meaning of s. 2 of the Firearms (Increased Penalties) Act 1971. The unchallenged and uncontradicted medical evidence showed beyond any doubt that the handgun must have been fired in the direction of the deceased with the intention of causing him physical injury. There is not a scrap of evidence suggesting the contrary.

The testimony of Siew Kim shows that only one weapon, namely, the handgun, was used in the robbery. Upon the facts of this case, without this handgun, it would not have been feasible to frighten and to rob the occupants of the house. The accused, who as I have already found was *participis criminis* in the robbery, may reasonably be presumed to have known that one of his compatriots who had used the handgun was carrying or had in his possession or under his control such arm. It could reasonably be inferred, and I did so infer, that the accused and his compatriots had prior to the robbery, planned the details of their respective roles in the robbery; that is to say, who would be armed, who would enter the house, who would demand for and collect the property, the subject matter of the robbery, who would keep a look out and so on. Similarly, they must have planned their means of transport to and from the scene.

In the circumstances, I was satisfied that the prosecution had established the five essential elements of the offence charged hereinbefore mentioned, and the onus, as I have already said, passed to the accused to prove, on the balance of probabilities (See *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89) that he had taken all reasonable steps to prevent the discharge of the firearm concerned.

The bare denial of the accused that he was even a party to the robbery, which I have already rejected as false and untrue for the reasons stated, and his conduct at the scene to which I have already adverted, could not possibly discharge the onus which lay upon him. If anything, it served to strengthen and to confirm the case for the prosecution. In the circumstances, I arrived at the inevitable conclusion that he was guilty of the offence charged and I accordingly convicted him and sentenced him to death, that being the mandatory sentence provided under the Act.

Also found [1992] 2 CLJ 1242